# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

SOUTHSIDE MEDICAL CENTER, INC.

and

CASE 10-CA-37919

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1644

Lisa Y. Henderson, Esq. and Carla L. Wiley, Esq., for the General Counsel James D. Fagan, Jr, Esq. (Stanford Fagan LLC), for the Charging Party Donald R. Lee, Esq., for the Respondent

#### **DECISION**

#### **Statement of the Case**

**KELTNER W. LOCKE, Administrative Law Judge**: This case turns on whether a person discharged for attending a union meeting was a supervisor, and therefore unprotected by the National Labor Relations Act (the "Act"). Because Respondent has not carried its burden of establishing that person's supervisory status, I conclude that it violated Section 8(a)(3) and (1) of the Act.

## **Procedural History**

This case began on June 8, 2009 when the American Federation of State, County and Municipal Employees, Local 1644 (the "Union" or "Charging Party") filed an unfair labor practice charge against Southside Medical Center, Inc. ("Respondent"). After an investigation, the Regional Director for Region 10 of the Board issued a Complaint and Notice of Hearing (the "Complaint") on August 3, 2009. In doing so, the Regional Director acted for the Board's General Counsel (the "General Counsel" or the "government"). Respondent filed a timely Answer to the Complaint.

On September 24 and 29, 2009, I conducted a hearing in Atlanta, Georgia. At the beginning of the hearing, the General Counsel amended the Complaint by adding a new paragraph alleging certain 8(a)(1) violations. Respondent denied these allegations.

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The parties filed post–hearing briefs, which I have read and considered.

# **Admitted Allegations**

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Based on admissions in the Respondent's Answer, I find that the General Counsel has proven the allegations set forth in Complaint paragraphs 1, 2, 3, 4, 5, 6, 7, and 8.

Specifically, I find that the Union filed and served the unfair labor practice charge as alleged, and that it is a labor organization within the meaning of Section 2(5) of the Act.

Moreover, based upon undisputed evidence in the record, I find that since March 1986, the Union has been the certified bargaining representative of a unit of Respondent's employees, that Respondent has recognized the Union as exclusive representative, and that such recognition has been embodied in collective—bargaining agreements, including an agreement in effect between

July 7, 2006 and July 7, 2009.

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Additionally, based upon the Respondent's Answer, I find that Respondent meets both the statutory and the Board's discretionary standards for assertion of jurisdiction and that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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Further, I find that the following individuals are Respondent's supervisors and agents within the meaning of Section 2(11) and Section 2(13) of the Act: Interim Director of Nursing Jewellene McCrary; Chief Medical Officer Barbara McMillan–Persaud; Director of Human Resources Ann Williams; and Chief Executive Officer David Williams.

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Moreover, Respondent has admitted and I find that on about May 8, 2009, it discharged its employee Amelia Kemp. However, it has denied that Kemp's discharge violated the Act.

#### **Contested Issues**

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The General Counsel asserts that Kemp was not a supervisor within the meaning of the Act and that, accordingly, her attending a Union meaning constituted activity protected by the Act. Therefore, the General Counsel asserts, Respondent's discharge of Kemp for attending the Union meeting violated Section 8(a)(3) and (1) of the Act.

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Respondent argues that Kemp was, in fact, a statutory supervisor and, therefore, her presence at a Union meeting fell outside the Act's protection.

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The General Counsel's amendment to the Complaint at hearing adds the allegations that on about May 4, 2009, Respondent, by Human Resources Director Ann Williams, interrogated employees about attendance at Union meetings and about discussing their salaries. The government asserts that Respondent thereby violated Section 8(a)(1) of the Act.

#### **Facts**

Respondent employed Amelia Kemp as a certified medical assistant ("CMA"), a position within the bargaining unit represented by the Union. Respondent also employed two individuals with the job title "clinical manager." These positions were outside the bargaining unit.

At some point during 2008, Respondent created a new position titled "clinical manager, (floater)." Human Resources Director Ann Williams then invited Kemp to apply for it. Initially, in the fall of 2008, Kemp declined to apply.

In January 2009, Williams again invited Kemp to apply for the new and as yet unfilled position. Although it appears that Kemp remained reluctant to apply for the position, ultimately she did. By letter dated March 23, 2009, Williams informed Kemp that she had been selected, effective the next day. The letter informed Kemp that her annual salary would be \$30,000, but it did not describe the job duties associated with this position.

# The "Clinical Manager (Floater)" Position

This case turns on whether Kemp met the statutory definition of "supervisor" in her position as "clinical manager (floater)." Because that question involves a legal conclusion, it will be addressed under the "Legal Analysis" section, below. However, the conclusion depends, in part, on whether Kemp possessed any of the supervisory powers listed in Section 2(11) of the Act. Whether or not she possessed any of these powers is a question of fact which will be discussed here.

To satisfy one part of the statutory test for supervisor, the individual must possess the power to do at least one of the following: Hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. 29 U.S.C. § 152(11) The analysis begins by examining whether the individual possessed one or more of these powers. If she did not, the analysis stops by concluding that the person did not meet the statutory definition of supervisor. If she did have the authority to take one of the specified actions, then the analysis must proceed to further steps. However, the first question to be answered is whether the putative supervisor possessed one of the listed powers.

On March 24, 2009, Kemp signed an acknowledgement that she had read and understood the job description for "clinical manager." (The record does not include a separate job description for "clinical manager (floater)" and I infer that such a separate job description does not exist.) The job description for "clinical manager" states in part, as follows:

#### GENERAL DESCRIPTION OF POSITION

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Report[s] Directly to the Chief Medical Officer. Supervises and coordinates administrative management functions of Southside's satellite locations.

#### DETAILED DESCRIPTION OF POSITION

- 1. Coordinates the implementation and organizational policies and procedures designed to improve operational efficiency.
- 2. Has a thorough knowledge of patient health care delivery systems.
- 3. Ensures compliance with clinical patient care standards, regulatory requirements[,] established policies and procedures.
- 4. Responsible for the supervision of all administrative functions and clinical services in conjunction with provider.
- 5. Monitors and oversees the operation of the satellites.
- 6. Attends scheduled administrative staff meetings.
- 7. Provides monthly administrative reports to the Chief Medical Officer.
- 8. Facilitates resolution of customer service issues.
- 9. Serves as administrative liaison to medical and nursing staff.
- 10. Performs other job related duties as assigned.

# KNOWLEDGE, SKILLS AND ABILITIES

- 1. Ability to plan, organize and prioritize.
- 2. Ability to communicate effectively with patients and staff.
- 3. Supervisory skills.
- 4. Has the ability to use independent sound judgment in daily decision—making.

# 25 <u>MINIMUM QUALIFICATIONS</u>

Degree preferred with a good understanding of medical terminology. Some leadership experience preferred. Must have reliable transportation. Must be computer literate. Bilingual a plus.

# TYPICAL PHYSICAL DEMANDS

Requires sitting for long periods of time. Requires eye—hand coordination and manual dexterity sufficient to operate a keyboard, photocopier, telephone, calculator and other office equipment. Requires normal range of hearing and eye sight to record, prepare and communicate appropriate reports.

#### TYPICAL WORKING CONDITIONS

Normal office environment. Occasional evening or weekend work.

The actual duties assigned to Kemp when she assumed the position of "clinical manager (floater)" bore little resemblance to the duties listed in the "clinical manager" job description quoted above. Kemp's actual duties involved checking medical logs at different facilities operated by Respondent.

The testimony of two management officials establishes that the perceived need to keep the medical logs current was a motivating factor in the decision to create the "clinical manager (floater) position. Thus, Respondent's chief medical officer, Barbara McMillan–Persaud testified, in part, as follows:

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- Q. Dr. Persaud I'm going to hand you it's already been marked and entered into evidence as General Counsel Exhibit 5. This is a letter to Ms. Kemp notifying her of her promotion. It's got clinical manager (floater). Could you explain that term clinical manager (floater)?
- A. The clinical manager (floater) is that we would need Ms. Kemp, the idea was to have Ms. Kemp go to the satellite location, in addition to working at the main center, go the satellite locations to update the logs, to keep the log books in order after she got them taken care of. So on occasion she would have to go out there to do that.
- **Q.** I understand. When you say got them taken care, what does that mean exactly?
- A. Basically, what we wanted her to do, they weren't in order. Log books should be maintained on a regular basis and the people that were responsible for maintaining those log books hadn't been doing what they were supposed to be doing, so we knew Ms. Kemp had very good skills in order to get that taken care of, cause she was doing that at Thomasville so that's what we wanted her to do. Does that answer the question?
- **Q.** Yes. So these log books were not maintained at the time Ms. Kemp was promoted?
- A. Right.

Correcting and updating the medical log books consumed most of Kemp's work time in her position of "clinical manager (floater)." Interim Director of Nursing Jewellene McCrary testified as follows:

- **Q.** During Ms. Kemp's tenure as clinical manager, what did she spend the majority of her time doing?
- **A.** Assessing, correcting the logs.

McCrary explained that Respondent uses logs to record various types of medical testf results, but that the entries in the various log books were not up to date. McCrary particularly was concerned that the abnormal lab results log book and the pap smear log book were not current. Therefore, she assigned Kemp to visit each of Respondent's facilities, inspect the log books, and bring them up to date.

In performing these functions, Kemp also sometimes instructed employees on the correct way to keep the log books. Essentially, Kemp provided employees with the same information printed on instruction sheets for the log books.

Kemp's duties also included examining an emergency medical supply kit called the "Banyon Kit," to make sure that it contained the specified medicines and other items which would be needed quickly when an emergency occurred.

The testimony of the chief medical officer and the interim director of nursing leaves no doubt that during her service as "clinical manager (floater)," Kemp performed few if any duties other than conducting these inspections and inventories. Her work differed markedly from that of the two "clinical managers," Eldry Cannada and Lissette Pizarro.

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This difference is significant because Respondent offered, as proof of Kemp's supervisory status, evidence concerning the duties and authority of Cannada and Pizarro. The relevance of such information depends on how closely Kemp's job resembled those of Cannada and Pizarro. If Respondent had expected Kemp to carry out the same functions, Respondent logically would have given Kemp the same authority. However, a similarity in authority cannot be inferred if Kemp's responsibilities differed from those of Cannada and Pizarro and if she performed a different function within the organization.

Respondent presented evidence that Cannada and Pizarro exercised some of the supervisory powers listed in Section 2(11) of the Act, including assigning employees to work at particular locations, approving leave requests and awarding "star points" to employees under an incentive program. The two clinical managers also provided administrative reports to the chief medical officer. However, the testimony of Respondent's chief medical officer, Dr. McMillan–Persaud, leaves no doubt that, notwithstanding the similarity in job titles, Kemp did not perform the same tasks or have the same responsibilities as Cannada and Pizarro:

- Q. During the period between her promotion in March and her discharge in May did Ms. Kemp communicate with you in any way concerning patient flow?
- A. No

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- **Q.** Did Ms. Kemp take any actions to grow the clinic?
- A. No.
- **Q.** Did Ms. Kemp take any action to supervise any staff?
- A. The only thing I think she had to do with the staff was when she found some sort of inconsistency or something that was not done with the log books she would discuss it with that particular staff member.
- **Q.** Did she discipline anyone?
- **A.** Not that I know of.
- **O.** Did she reward anyone?
- **A.** Not that I know of.
- Q. During the period after Ms. Kemp's promotion did she provide you with any monthly administrative reports?
- A. No.
- **Q.** Did she provide you with any reports at all?
- **A.** Not me directly, no.
- **Q.** Are you aware of the facilitation of any resolution of any customer service issues that Ms. Kemp handled?
- **A.** No.
- Q. Are you aware of any occasions that Ms. Kemp served as an administrative liaison to the medical and nursing staff?
- A. No
- Q. Are you aware of employees that Ms. Kemp transferred from one satellite to another?
- A. No.
- **Q.** Are you aware of any star points that Ms. Kemp awarded to anyone?
- A. No.
- Q. Are you aware of any leave that Ms. Kemp granted upon request by an employee?
- **A.** No.

- Q. Now you testified that these are things that she, Ms. Kemp, would have been doing?
- A. Yes.
- **Q.** But the fact is that Ms. Kemp didn't do any of them, is that correct?
- A. Right.
- Q. You testified that you saw Ms. Pizarro and Ms. Cannada three or four times a month, is that correct?
- A. Yes
- **Q.** And you talked to them perhaps two to three times a week, is that correct?
- A. Yes
  - Q. But you didn't see Ms. Kemp three to four times a month, did you Dr. Persaud?
  - A. No.
  - **Q.** Nor did you speak with her over the phone two to three times a week, did you?
  - **A.** No.

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In the testimony quoted above, Dr. McMillan–Persaud sometimes answered "Not that I know of." It may be observed that as chief medical officer, and as Kemp's immediate supervisor, Dr. McMillan–Persaud likely possessed more information about Kemp's job duties than any other manager. If Kemp had disciplined or rewarded an employee on any occasion, Dr. McMillan–Persaud very likely knew about it.

Moreover, testimony given by Interim Director of Nursing Jewellene McCrary paints a consistent picture. McCrary testified, in part, as follows:

- Q. Okay. Now you also testified, I believe, that Ms. Kemp spent the majority of her time after her promotion assessing and correcting the log books, is that correct?
  - A. Yes.
  - Q. What did she do with the minority of her time, what did she do with the rest of the time?
  - **A.** Well, the plan was to get it all done and leave it initially and once everything was correct and complete then it would just be a little time where she would go back and just spot check.
  - **Q.** But the time that she actually was doing this.
  - **A.** That was all she was doing.
  - **Q.** That was all she was doing, correct?
  - A. Yes.

Based on the testimony of Interim Director of Nursing McCrary and Chief Medical Officer McMillan–Persaud, which I credit, I conclude that the recently–created position of "clinical manager (floater)" differed markedly from the "clinical manager" positions created earlier. During Kemp's service as the "clinical manager (floater)," her duties consisted only of checking and correcting the medical log books and making sure that the "Banyon kit" contained a current and complete inventory of medical supplies. Therefore, the testimony of the two "clinical managers" concerning their own duties sheds no light on Kemp's authority in the "clinical manager (floater)" position.

No employees reported to Kemp. She did not assign or direct any employee's work. She did not hire, discharge or discipline any employee and never recommended that management take such action. Rather, her work involved duties – inspecting log books and correcting them,

conducting an inventory of emergency supplies – that were essentially clerical in nature.

Respondent may contend that it expected Kemp to perform other duties once she had finished her initial assignment of bringing the log books up to date. That argument might be more persuasive if the first six weeks on the job amounted to a training period, at the end of which Kemp would be given more responsibilities. However, credible evidence does not support the conclusion that Kemp was a "trainee."

Nothing in either the job announcement or the job description for clinical manager suggests that the position was that of management trainee. Nothing in the record suggests that management told Kemp she would be a trainee and no management representative testified that Kemp was a trainee.

Indeed, Respondent stated in its post—hearing brief that "any training analogy is not apt because she was not promoted to a 'Clinical Manager Trainee' position." The brief further noted that Kemp's pay was the same as that of another clinical manager, which would be unlikely if Kemp merely were a trainee.

In theory, the narrow nature of Kemp's job duties might be explainable this way: For reasons including compliance with government regulations, it had become imperative for Respondent to correct log book deficiencies just as quickly as possible. Therefore, when Kemp assumed the position of "clinical manager (floater)," Respondent directed her to give highest priority to this task, even at the expense of other duties.

Under this theory, Kemp possessed supervisory authority from the beginning of her service as "clinical manager (floater)," but had neither the time nor the opportunity to exercise it. Nonetheless, it was there, in her pocket so to speak, and ready if she needed it.

This theory presents a serious argument which must be considered carefully. However, my evaluation of the facts leads me to reject it.

The argument would be more persuasive if the record showed a gradual expansion of Kemp's responsibilities. Such an expansion would indicate that Respondent indeed had expected Kemp to exercise supervisory authority once the pressing log book work had been completed. However, credible evidence does not prove that Kemp's duties and responsibilities increased over time. To the contrary, Kemp appears to have been doing the same work the entire time she served as "clinical manager (floater)."

To be sure, Kemp only held this position for about a month and a half, from March 24, 2009 to May 8, 2009. However, the record does not suggest any significant expansion of Kemp's duties during this period.

It seems reasonable that if Respondent really did have plans to expand Kemp's job duties, management would have told Kemp. However, the credited evidence indicates to the contrary.

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Kemp testified that she was working as a medical assistant at one of Respondent's facilities when she received a call from the secretary to the human resources director, asking her to come to the main facility. There, Kemp met with Interim Director of Nursing Jewellene McCrary and Human Resources Director Ann Williams, who offered her the job of "clinical manager (floater)." Kemp testified that when she inquired about her job duties, Williams "stated that I would just be maintaining the log books." Kemp further testified as follows:

- Q. You testified that Ms. Williams told you what your duties would be as this Clinical Manager, did she, to the best of your recollection, were you told that your duties as Clinical Manager would change at any time?
- A. No.
- **Q.** Were you told that anything about a temporary assignment that you were doing?
- A. No.
- **Q.** Were you told anything about a special project that you would be doing?
- A. No.

Based on my observations of the witnesses, I credit this testimony. Therefore, I find that Human Resources Director Williams did not tell Kemp that her duties would be changing, or that they were a temporary assignment or special project. Credited evidence does not indicate that anyone in management made such representations to Kemp.

Moreover, Kemp credibly testified that she did not consult with either of the clinical managers about how to perform their job. There would be no need for such a discussion unless Kemp's duties were to be expanded.

To summarize, Respondent assigned to Kemp only the clerical functions of keeping the medical logs up to date and making sure that Banyon kits were stocked with the specified emergency medical supplies. Respondent did not tell Kemp that her duties would increase later. In fact, Kemp's duties did not expand over time. In these circumstances, it appears doubtful that Respondent intended to enlarge Kemp's duties later to make them equal to those of Cannada and Pizarro.

Respondent bears the burden of proving, by a preponderance of the evidence, that Kemp possessed at least one of the supervisory powers listed in Section 2(11) of the Act. Under the "preponderance of the evidence" standard, the proponent of a claimed fact must prove that the "fact" is more likely than not to be true. However, based on the present record, I cannot conclude that it is more likely true than not true that Respondent ever assigned Kemp duties requiring the exercise of any supervisory power. In the absence of such duties, it seems very unlikely that Respondent would confer on Kemp any supervisory authority. I conclude that Kemp did not possess such authority at any time.

This conclusion does not depend on any "secondary indicia" of supervisory status, but it is consistent with those indicia. For example, although the two clinical managers were street clothes, Kemp continued to wear the same color scrubs she had worn as a medical assistant.

To borrow Mark Twain's memorable simile, I conclude that the duties of the two clinical managers were no more like Kemp's duties than lightning resembles a lightning bug. Certainly,

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Kemp's position had a similar–sounding name, but a similarity of title does need not mean a similarity of responsibility and authority.

No evidence indicates that Respondent ever assigned Kemp to "pinch hit" for either of the clinical managers. Kemp simply performed the same essentially clerical functions. For all the reasons discussed above, I find that Kemp never possessed any of the supervisory powers listed in Section 2(11) at any time.

# **Kemp's Union Activity**

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In early May 2009, someone placed an unsigned, scurrilous letter in McCrary's mailbox. The text of letter, verbatim and with errors uncorrected, is as follows:

## Ms McCrory

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you gave kemp a new job, you such a low down dirty coward that you did tell any one. Your shit has hit the fan. No one trust you . you lie , and stab everyone in the back. I bet kemp didn't tell you that she went to the union meeting and voted , did she that going to get your ass. Kemp just like you will sell her soul to the devil. Everyone from the top floor to ground floor know what a big liar you are. You sit in that stinking office of yours and don't do anything but tell lies about what you do. I just want to let you know your time is at hand. You are about to get it. Your time is at hand. Playing sick whenever something has to be done. You don't do anything but lie that's have caught up with you. Nursing meeting going to be what? what fool will you have up their doing your job. There is only one person in nursing that half way beloved in you. But I don, know after I tell her what you and Kelly said about her. So read this and watch faces Friday.

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Notwithstanding that the anonymous writer repeatedly called McCrary a liar and made veiled threats ("Your time is at hand" and "You are about to get it"), and notwithstanding that the agitated and incoherent tone of the letter added to the apparent seriousness of the threats, McCrary did not conduct an investigation to identify the letter writer. On cross—examination, McCrary acknowledged that such threats violated Respondent's rules. However, the record does not establish that Respondent made an effort to trace the unsigned letter or take action against its author.

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# The Alleged 8(a)(1) Violations

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Respondent's management did become concerned about one phrase in the letter: "I bet kemp didn't tell you that she went to the union meeting and voted. . ." Human Resources Director Williams began an investigation. Williams credibly testified that she spoke with Kemp on May 4, 2009 about her attendance at this meeting:

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[O]n May 4th, I met with Ms. Kemp in my office in reference to her attendance at the bargaining unit meeting, she began to tell me that one of her coworkers did not have a way to go to the meeting and she had volunteered to take her and as she started telling me everything that had happened. I asked her if she would have any problems in writing it because I couldn't remember and she said that she didn't have any problems in doing that. She wrote down that she had attended the meeting on April 20th, she indicated at

first that she didn't go into the meeting.

Two days later, Williams again met with Kemp. According to Williams, Kemp changed her story, now saying that the Union meeting she attended was on March 20 rather than April 20. On that earlier date, Kemp had been a medical assistant and a member of the bargaining unit and clearly had the right to attend a Union meeting.

Based on Williams' credited testimony, quoted above, I find that Respondent, by its human resources director, did question Kemp concerning her Union activities. The lawfulness or unlawfulness of this conduct will be discussed in the "Legal Analysis" section below.

As Williams' testimony, quoted above, indicates, she requested that Kemp write out a statement. Kemp did so, and gave it to Williams. During Williams' testimony, she responded as follows to questions about Kemp's statement:

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**Q.** Ms. Williams, further down it states that she, Ms. Kemp did not discuss her salary with anyone, why did, based on your conversations with her, why did she speak to that issue, about salary?

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**A.** Probably because I asked her if she had discussed her salary with anyone and she responded no.

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**Q.** Why did you care whether or not she discussed her salary with anyone?

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A. Well, I thought that as a manager, it was not professional or it should not, her salary should not be discussed with anyone else, sometimes, for certain positions, we negotiate salaries, so the salaries may be different and then sometimes individuals will try to compare salaries according to what one manager is doing versus another manager to say that okay, if she's doing this job, then she's making 'x' number of dollars because Ms. So and so is making 'x' number of dollars.

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Based on this testimony, which I credit, I find that Human Resources Director Williams did ask Kemp whether she had discussed her salary with anyone. The lawfulness or unlawfulness of this inquiry will be discussed under the "Legal Analysis" section below.

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As discussed above, Williams was concerned that Kemp had changed her story about when she attended the Union meeting. She decided to investigate to ascertain whether the meeting had been in March or April.

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On May 8, 2009, Williams called the Union hall and spoke with someone named Joyce, who told her that there had not been a Union meeting on March 20. Williams testified that she called Joyce more than once because, during the first telephone conversation, she only asked about a Union meeting on March 20 but did not ask Joyce whether there had been a meeting a month later, on April 20.

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Williams' testimony suggests that she had some difficulty reaching the Union hall the second time she called, and that she suspected that Joyce was not answering the phone. Interim Director of Nursing McCrary lent her cellphone to Williams so that the number showing up on Joyce's caller ID would not be identified with Respondent. Williams testified that Joyce then answered, and verified that there had been a Union meeting on April 20.

# **Discharge of Kemp**

According to Human Resources Director Williams, she and Respondent's chief executive officer, David Williams, made the decision to discharge Kemp. During her testimony, the human resources director identified three reasons for the decision to terminate Kemp's employment:

- Q. Again, I'm sorry again to interrupt you, I hear the narrative you're giving me, but again what reason, what is it that happened?
- **A.** Well, she was untruthful about the dates and she did attend a union meeting as a manager of a corporation, which means at that time, she was representing the company because she was management.
- Q. So, again, the two basis that I have heard are that number one, she was not truthful in an investigation, in your estimation?
- A. Yes.

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- **Q.** And number two, she was a manager and she attended a union meeting?
- A. Yes.
- Q. Other than those two items, was there any other conclusion that you drew from your investigation that caused you to discharge Ms. Kemp?
- **A.** She violated company policy.
- **Q.** Okay and what is the company policy?
- **A.** About the integrity of the corporation.
- **O.** Is that written somewhere?
- 25 **A.** Yes, it is.
  - **Q.** Do you know—?
  - **A.** It's under Major Violations.
  - **Q.** Okay.
  - **A.** And Major Violations warrant termination.
  - **Q.** And the specific major violation of the company policy was what?
  - **A.** The integrity of the corporation to put that at risk.
  - **O.** What was putting the integrity of the corporation at risk?
  - **A.** Her actions.
  - **Q.** And the actions being attending the union meeting?
  - A. Yes
    - Q. And, so, was there any other reason, other than not being truthful, attending a union meeting as a manager and committing a major violation of company policy, was there any other reason that Ms. Kemp was discharged?
    - A. No.

Respondent has admitted that Human Resources Director Williams is its supervisor within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act. Therefore, Williams' testimony, quoted above, constitutes an admission imputable to Respondent.

Moreover, both Human Resources Director Williams and Interim Director of Nursing McCrary signed a May 14, 2009 memo informing Kemp of her discharge. The memo, titled "Termination/Major Violation of Company Policy," stated as follows:

On March 24, 2009, you were promoted to Clinical Manager. At that time, you were advised that with this new management position, you are no longer a member of the Union. On Monday, April 20, 2009 you were in attendance at a Union meeting. You admitted attending the Union meeting. This conduct endangers the integrity and reputation of Southside Medical Center, Inc. This is a major violation of company policy.

Therefore, your services are hereby terminated with Southside Medical Center, Inc., effective today, May 14, 2009.

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Significantly, this memo states only one reason for Kemp's termination, her attendance at the Union meeting. It does not make any reference to Kemp's truthfulness. This memorandum is contemporaneous with the discharge, and I accord it more weight than Williams' later testimony. The 4-month period between Kemp's discharge and Williams' testimony provided ample time to search for additional reasons to justify the discharge. I conclude that the asserted concern about Kemp's truthfulness is such a makeweight reason added after the fact. Respondent's further assertion that Kemp broke company policy does not constitute a separate reason because the company policy concerned attendance at union meetings.

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For the purpose of analysis, I will assume that at some point, management held a sincere and good faith belief that Kemp had lied about the date of the Union meeting she attended, rather than simply becoming confused about it. Even making that assumption, I cannot conclude that management's belief about Kemp's truthfulness affected the decision to discharge her. It seems quite unlikely that management would say nothing in the discharge memo about an employee's lack of candor if management had, in fact, considered that matter during the decision–making process. Therefore, I conclude that Kemp's truthfulness, or, more exactly, the perceived lack of truthfulness, was not a substantial or motivating factor in the decision to discharge her.

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Respondent discharged Kemp for engaging in Union activity. Whether or not that discharge was lawful depends on whether Kemp, in her new position, was outside the Act's protection. Although the Act protects employees, in most instances it does not protect persons who meet the statutory definition of "supervisor" or who are "managerial employees" as defined in the case law.

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# **Legal Analysis**

The Act defines the term "employee" and protects the rights of those who meet that definition to engage in certain activities, including forming, joining or assisting a labor organization. The definition of employee excludes "any individual employed as a supervisor" and in most instances, those who meet the definition of "supervisor" do not enjoy the Act's protection.

The present case turns on whether the person Respondent discharged, Amelia Kemp, falls within the Act's definition of "employee," 29 U.S.C. § 152(3), or "supervisor," 29 U.S.C. § 152(11). Therefore, that question will be the first addressed in this legal analysis.

# **Supervisory Status**

The burden of proving supervisory status rests with the party asserting such status. *Barstow Community Hospital*, 352 NLRB 1052 (2008); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998); *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998). In this instance, Respondent bears the burden of proving, by a preponderance of the evidence, that Kemp was a supervisor as defined by the Act.

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The Act defines "supervisor" to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11).

Thus, to warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

For the reasons discussed above, as a matter of fact I have found that Kemp did not possess any of the powers listed in Section 2(11). Because Respondent did not carry its burden of proving this first necessary element, the analysis need not proceed to the second and third elements.

However, this analysis does need to address legal arguments which Respondent raised to support its assertion that Kemp met the statutory definition of "supervisor." For example, Respondent argues that the government's theory ignores the well–established principle that the first element of the test is satisfied if the putative supervisor merely *possesses* one of the powers listed in Section 2(11). Respondent asserts, in effect, that the General Counsel's theory, if adopted, would change the test by requiring proof that the person actually had exercised the power.

In evaluating the evidence, I have focused on whether Kemp *possessed* one of the listed powers, not whether she had exercised it. However, looking for the existence of an as-yet-unexercised power presents something of a challenge – no blood test can detect whether someone has been infected with asymptomatic supervisory authority – so the method of searching for it and the criteria applied warrant discussion.

Proving the possession of authority requires proving more than the appearance of authority. The evidence must manifest a real, even though as—yet—undrawn sword in the scabbard, and not merely a handle glued to the top of the sheath.

In determining whether a person possesses supervisory authority, the Board thus examines whether the authority is real or simply illusory, the illusion created by some words on a piece of paper. Mere "paper authority" is insufficient. *Loyalhanna Care Center*, 352 NLRB 863 (2008); *Training School of Vineland*, 332 NLRB 1412, 1416, 1417 (2000). The evidence must suffice to establish both that supervisory authority actually existed and that its exercise required the use of independent judgment. *Barstow Community Hospital*, above, citing *Avante at Wilson*, 348 NLRB 1056, 1057 (2006).

An employer–created job description either may reflect an authentic grant of authority or create the illusion of authority. Determining which is the case requires evidence external to the job description itself. Accordingly, Board precedent holds that employer–prepared job descriptions, although relevant, are not controlling. See, e.g., *Loyalhanna Care Center*, above, citing *Oakwood Healthcare*, *Inc.*, above, slip op. at 5 fn. 24.

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In the present case, other factors diminished the probative value of the job description which Respondent presented to prove Kemp's supervisory authority. Credited evidence established that this job description pertained to the position of "clinical manager," a position with different duties and responsibilities from those of the "clinical manager (floater)" position held by Kemp. Kemp's duties, as a "clinical manager (floater)" differed so markedly from those of the two "clinical managers" that their job description had little relevance.

Moreover, because of the job description's vagueness and ambiguity, it provided little specific information even about the duties of the two "clinical managers," Cannada and Pizarro. For example, the job description stated that the person "supervises and coordinates administrative management functions" and that the person is "responsible for the supervision of all administrative functions and clinical services in conjunction with provider." The words "supervises and coordinates administrative management functions," taken literally, suggest that this individual supervises management personnel rather than bargaining unit employees. However, in light of other evidence, such an interpretation certainly would appear to be erroneous.

Because the job description refers to supervising "functions" rather than employees, it does not reveal what employees, if any, reported to the clinical managers or performed work subject to their oversight. The job description also falls short of stating what types of authority the clinical managers exercised.

Lacking such specific information, the "clinical manager" job description must be considered conclusory at best. The Board has held that conclusory statements without supporting evidence do not establish supervisory authority. *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995); *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991).

Respondent presented considerable evidence concerning the duties of Cannada and Pizarro, and argued that Kemp possessed the same authority, even though she never exercised it. Certainly, Cannada and Pizarro held the title "clinical manager" and Kemp was called a "clinical manager (floater)," but the similarity ends with the job title. Based upon the limited nature of Kemp's duties, as compared to those of the other two clinical managers, Kemp might warrant the

apt but hard-to-pronounce acronym CMINO: Clinical Manager in Name Only.

Responsibility and authority typically go hand—in—hand. Because management did not direct Kemp to perform the functions handled by the other two clinical managers, it seems unlikely Respondent would have endowed her with similar authority. For the reasons discussed above, I have concluded that Respondent did not.

# **Managerial Status**

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Respondent further argues that even if Kemp was not a supervisor, she was a "managerial employee" outside the Act's protection. Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). These individuals, the Supreme Court observed, were "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, above, 416 U.S at 283; see also *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980).

A managerial's "effectuation" of management policies entails the exercise of independent discretion. However, Kemp had no such discretion when she "effectuated" management policy by performing the assigned clerical tasks as directed. Moreover, the record does not establish that Kemp formulated management policy and I find that she did not.

Accordingly, I conclude that Kemp was not a managerial employee excluded from the protection of the Act. To the contrary, I conclude that at all material times, Kemp was an employee within the meaning of Section 2(3) of the Act, and entitled to its protection.

# Section 8(a)(1) Allegations

During the hearing, the General Counsel amended the Complaint to add allegations that on about May 4, 2009, Respondent, by Human Resources Director Ann Williams, interrogated employees about attendance at Union meetings and about discussing their salaries. The government asserts that Respondent thereby violated Section 8(a)(1) of the Act.

For the reasons discussed above under the heading "The Alleged 8(a)(1) violations," I find that Respondent's human resources director did ask Kemp if she had attended the Union meeting and also asked her whether she had discussed her salary with anyone. At all times, Kemp has been an employee fully protected by the Act. Therefore, I will consider whether these questions interfered with, restrained, or coerced her in the exercise of rights guaranteed by Section 7 of the Act. If so, Respondent thereby violated Section 8(a)(1) of the Act.

Determining whether the questioning was unlawful requires that all the circumstances of the questioning be taken into account. In *Smith and Johnson Construction Co.*, 324 NLRB 970 (1997), the Board affirmed the administrative law judge's analysis of certain statements alleged to violate Section 8(a)(1) of the Act. The judge had described the framework for that analysis in these terms:

In deciding whether interrogation is unlawful, I am governed by the Board's decision in Rossmore House, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." The Board in Rossmore House noted the [test set forth in Bourne Co. v. NLRB, 332 F.2d 47 (2d Cir. 1964)] was helpful in making such an analysis. The Bourne test factors are as follows:

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1. The background, i.e. is there a history of employer hostility and discrimination?

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2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

The identity of the questioner, i.e. how high was he in the 3. Company hierarchy?

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4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?

Truthfulness of the reply. 5.

First, I will use this test to evaluate Williams' questioning of Kemp about her attendance at the Union meeting. As to the first factor, the record does not establish a history of employer hostility and discrimination. Therefore, this factor weighs in favor of finding the questioning noncoercive.

However, the second factor weighs heavily in favor of finding the interrogation coercive. Not only did Williams seek information about Kemp's protected activity, but she used that information as the basis for the decision to discharge her.

The interrogation was conducted by the Respondent's human resources manager, not by a firstline supervisor, and it was conducted at the main office, not in the workplace. Moreover, there was not one questioning session but two. Thus, the third and fourth factors also indicate that the questioning was coercive.

As to the fifth factor, truthfulness of the reply, Kemp changed her statement on a material point, the date of the Union meeting she attended. The record suggests that Williams suspected Kemp was not telling the truth, and Respondent now asserts that one reason for discharging Kemp was her failing to tell the truth. For reasons discussed above, however, I have concluded that Respondent actually discharged Kemp for one reason alone, her attendance at the Union meeting.

The record does not convince me that Kemp intentionally misrepresented the date of the Union meeting she attended, even though it does not rule out that possibility. Because of the 45 uncertainty on this point, I do not conclude that the fifth factor weighs either for or against a conclusion that the questioning was coercive.

Considering all the factors together, I conclude that Williams' asking Kemp about her attendance at the Union meeting was coercive and violated Section 8(a)(1) of the Act.

Applying a similar analysis, I further conclude that Respondent interfered with, restrained and coerced employees in the exercise of their Section 7 rights when Williams asked Kemp if she had discussed her salary with anyone. Well–settled precedent establishes that an employer may not prohibit its employees from discussing their wages. *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004); *Phoenix Transit System*, 337 NLRB 510 (2002); *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001). Such a rule violates the Act even if not phrased in mandatory terms. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992).

An interrogation after the fact, under the coercive circumstances here, chills the exercise of employee rights in the same way. Therefore, I find that Respondent violated Section 8(a)(1) of the Act, as alleged.

# Alleged Section 8(a)(3) Violation

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In many cases, alleged discriminatory actions against employees should be analyzed using the framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In a case involving mixed motives for management's decision to discipline or discharge an employee, the *Wright Line* framework provides a means of determining whether the employer would have made the same decision even in the absence of protected activity.

However, in the present case, I have concluded that only one reason, Kemp's attending a Union meeting, motivated Respondent's decision to discharge her. Accordingly, a *Wright Line* mixed—motive analysis would be neither helpful nor appropriate. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (May 8, 2006); *Phoenix Transit System*, above; *Saia Motor Freight Line, Inc.*, 333 NLRB 929 (2001).

In general, Section 8(a)(3) of the Act prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 158(a)(3). Discharging an employee for attending a union meeting inherently discourages membership in a labor organization. It also interferes with, restrains and coerces employees in the exercise of their Section 7 rights. Accordingly, I conclude that Respondent's discharge of Kemp violated both Section 8(a)(3) and 8(a)(1) of the Act.

# Remedy

Respondent, having violated the Act, must take certain actions to remedy those violations, including posting the Notice to Employees attached hereto as Appendix A. Before Respondent unlawfully discharged Kemp, her work involved going to Respondent's various "satellite" facilities to check and correct the medical log books and to make sure that the Banyon emergency kit at each facility contained the specified supplies. Respondent's discharge of Kemp therefore could have a chilling effect on the willingness of employees at the various facilities to

engage in activity protected by the Act. Therefore, Respondent should be required to post a notice not only at its primary office but also in each of its "satellite" facilities in the Atlanta area.

Respondent must also make Kemp whole, with interest, for all losses she suffered because Respondent unlawfully discharged her.

#### **Conclusions of Law**

- 1. Respondent, Southside Medical Center, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
  - 2. The Charging Party, American Federation of State, County and Municipal Employees, Local 1644, is a labor organization within the meaning of Section 2(5) of the Act.
  - 3. On or about May 4, 2009, Respondent Southside Medical Center, Inc., violated Section 8(a)(1) of the Act by interrogating an employee about her attendance at Union meetings and about discussing her salary with other employees.
- 4. On May 14, 2009, Respondent Southside Medical Center, Inc. violated Section 8(a)(3) and (1) of the Act by discharging its employee Amelia Kemp because she engaged in union activity protected by the Act.
  - 5. The unfair labor practices described in paragraphs 3 and 4 above affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended<sup>1</sup>

#### **ORDER**

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The Respondent, Southside Medical Center, Inc., its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from:

- (a) Interrogating employees about employees' activities protected by the Act, including employee attendance at union meetings and employee discussions concerning their salaries or other compensation.
- 40 (b) Discharging employees because they attended union meetings or engaged in other activity protected by the Act.

If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

- (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act:
- (a) Offer Amelia Kemp immediate and full reinstatement to her former position or, if her former position is not available, to a substantially equivalent position.
  - (b) Make Amelia Kemp whole, with interest, for all losses she suffered because of her unlawful discharge. Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).
  - (c) Within 14 days after service by the Region, post at its facilities in Atlanta, Georgia, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 4, 2009.
- (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C., April 22, 2010.

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Keltner W. Locke Administrative Law Judge

If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

#### APPENDIX A

#### NOTICE TO EMPLOYEES

# POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

**WE WILL NOT** interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

**WE WILL NOT** question employees about whether they attended union meetings, discussed their wages with other employees, or engaged in other activities protected by the National Labor Relations Act.

WE WILL NOT discharge any employee because the employee attended a union meeting.

**WE WILL NOT,** in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

**WE WILL** offer Amelia Kemp immediate and full reinstatement to her former position or to a substantially equivalent position if her former position no longer is available.

WE WILL make Amelia Kemp whole, with interest, for all losses she suffered because we unlawfully discharged her.

# SOUTHSIDE MEDICAL CENTER, INC. Respondent

<b>Dated:</b>	By: _		
	_	(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a

charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information for the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

233 Peachtree Street, N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531 Telephone: (404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERD, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (205) 933-3013